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No. 01-1107

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

vs.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, and JONATHAN O'MARA,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a statute which prohibits burning a cross with the intent to intimidate violate the First Amendment?

2. When a state court finds that one paragraph of a state statute is "overbroad" under federal First Amendment precedents, may that court declare the entire statute void without considering whether the paragraph is severable?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondents have withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Virginia Supreme Court in the present case unduly limits the ability of government to protect their citizens from threats of violence and to focus limited enforcement resources on the most pernicious threats. The court's broad interpretation of *R. A. V.* v. *St. Paul* appears to limit the legislature to a choice between not punishing the worst threats or dispersing its resources by prohibiting all threats and punishing them equally. Either result would be contrary to the rights of victims and society which CJLF was formed to advance.

February, 2002

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The present petition involves two separate incidents of cross burning. The cases were joined and decided together in the Virginia Supreme Court.

On May 2, 1998, in the City of Virginia Beach, Richard Elliott, Jonathan O'Mara, and David Targee placed a cross in the yard of James S. Jubilee and attempted to burn it. Elliott, who lived next door to Mr. Jubilee, was angry at him because he had previously complained about Elliott discharging firearms in his back yard. App. to Pet. for Cert. 2. O'Mara pleaded guilty to attempted cross burning and conspiracy while reserving the right to challenge the constitutionality of the statute on appeal. *Id.*, at 3. Elliott was convicted of the same offenses after a jury trial. *Ibid.*

The Court of Appeals affirmed both convictions in a published opinion. The court rejected the First Amendment challenge. It held that burning a cross with intent to intimidate is proscribable both as a threat and "fighting words," and that the prohibition was not "content discrimination." *O'Mara* v. *Commonwealth*, 33 Va. App. 525, 536, 535 S. E. 2d 175, 181 (2000), App. to Pet. for Cert. 57.

On August 22, 1998, Barry Black burned a cross during a Ku Klux Klan rally in Carroll County. The owner of the property was present and consented. App. to Pet. for Cert. 23 (Hassell, J., dissenting). The burning cross was visible to neighbors and a public highway and had an intimidating effect on other people. See *id.*, at 24; Pet. for Cert. 6-7. The Court of Appeals summarily affirmed Black's conviction, based on *O'Mara*, in an unpublished memorandum. App. to Pet. for Cert. 46.

The Virginia Supreme Court reversed in both cases, in a 4-3 decision. *Black* v. *Commonwealth*, 262 Va. 764, 553 S. E. 2d 738 (2001). The majority believed that the statute was "selective regulation of speech based upon content" under *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992). See 262 Va., at 771, 553 S. E. 2d, at 724, App. to Pet. for Cert. 7. The majority also held that the final paragraph of the statute rendered it "overbroad." See 262 Va., at 777-778, 553 S. E. 2d, at 745-746, App. to Pet. for Cert. 16-17.

SUMMARY OF ARGUMENT

R. A. V. v. *St. Paul* established that, although a state may prohibit some categories of speech altogether, even within those categories its ability to discriminate on the basis of content is limited. As the post-*R. A. V.* split of authority over cross-burning statutes demonstrates, the distinction between permissible and impermissible content discrimination requires further definition. The statute at issue in the present case distinguishes one kind of threat from others because this kind is worse than

others along the same dimension that makes threats proscribable in the first place.

Watts v. *United States* held that "true threats" may be proscribed, but it provided little guidance to distinguish "true threats" from "untrue threats." Because threats are an exceptionally harmful form of speech, this boundary needs to be more clearly defined.

The Virginia Supreme Court held that the statute at issue was fatally overbroad without considering whether the offending portion was severable. That would be reversible error under *Brockett* v. *Spokane Arcades, Inc.* if done by a federal court. Certiorari is appropriate to resolve whether *Brockett* applies to state courts when they consider federal constitutional attacks on state statutes.

ARGUMENT

I. *R. A. V.*'s distinction between permissible and forbidden "content discrimination" requires clarification.

R. A. V. v. *St. Paul*, 505 U. S. 377, 382-383 (1992) recognized that freedom of speech is not absolute, and that "our society . . . has permitted restrictions upon the content of speech in a few limited areas . . . ." Within these categories, the government may not engage in "content discrimination unrelated to their distinctively proscribable content." *Id.*, at 384. Content discrimination is permitted, though "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable . . . ." *Id.*, at 388.

R. A. V. was an important decision, see 4 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 20.39, p. 516 (3d ed. 1999), and like most important decisions it has generated new questions and divergent interpretations. In *Wisconsin* v. *Mitchell*, 508 U. S. 476, 482 (1993), the Wisconsin Supreme Court had interpreted *R. A. V.* to forbid a "hate crime" enhance-

ment for battery, and it was not alone in that view. See *id.*, at 483, n. 4. This interpretation was erroneous, though, and this Court unanimously reversed. See *id.*, at 490.

Cross-burning prohibitions which are more narrowly focused than the St. Paul ordinance have similarly produced divergent interpretations of *R. A. V.* The Attorney General has already demonstrated the deep split of authority on this point. Pet. for Cert. 14-25. Evidently, more clarification is needed.

Beyond any question, Elliott and O'Mara's "expressive conduct" of planting a cross in Mr. Jubilee's yard and attempting to burn it is an act the state may prohibit and punish. To apply *R. A. V.*, it is necessary to determine why this expressive conduct is proscribable and how it differs from permitted expressive conduct within the same category.

Historically, the burning cross is a threat employed by a terrorist organization to intimidate people and prevent them from exercising their civil and constitutional rights. See, *e.g.*, W. Wade, The Fiery Cross 279, 328-329 (1987). Such intimidation has long been a federal offense. See 18 U. S. C. § 245(b). A similar purpose is apparent in the statute at issue in the present case. The intent to intimidate is an element of the offense.

The difficult aspect of the question, and the one requiring this Court's attention, is how to apply *R. A. V.*'s rule of content discrimination within a proscribable category. This task requires an assessment of why this particular kind of threat is singled out from the universe of threats. This determination is part of the federal First Amendment analysis to be determined *de novo* in this Court, not an aspect of statutory construction, on which the state court's decision would be binding. See *Mitchell*, 508 U. S., at 483-484.

A state may choose to proscribe only a subset of a proscribable category which it perceives to be the worst along the same dimension that made the category proscribable in the first place. If Congress decides that threats against the President

cause greater harm to the operation of government than threats against other federal officials, it can prohibit only the former. See *R. A. V.*, 505 U. S., at 388. This is true even though the differential treatment is not politically neutral. Those who are inclined to threaten the President are likely to have different political views than those who are inclined to threaten the senior leader of the opposing political party. That disparate impact does not invalidate the statute under *R. A. V.* To borrow a phrase from a closely related area of First Amendment law, the difference is justified without reference to its impact on differing viewpoints. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989); see also *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968) (burning draft card, "governmental interest is unrelated to the suppression of free expression").

The present statute's differential treatment of the burning cross is justified without reference to the fact that it may inhibit the expression of bigots more than it does the expression of believers in racial equality. The burning cross is singled out because its history of usage by a large, powerful terrorist organization causes it to strike a deeper fear into the hearts of the targets. This particular threat causes the same kind of harm that threats generally cause, but in greater degree. That is an entirely legitimate reason to single it out for special prohibition and punishment.

II. The proscribable category of threats requires further definition.

Several categories of speech or expressive conduct may be prohibited on the basis of their content. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382-383 (1992). Three of these relate to violence: threats, "fighting words," and advocacy of violence. See *Rankin* v. *McPherson*, 483 U. S. 378, 397 (1987) (Scalia, J., dissenting) (noting these among the categories "entitled to no First Amendment protection"). The three differ in terms of the

perpetrator and the target of the feared violence. The threat category has not been sufficiently defined.

"Fighting words" are words likely to cause the listener to assault the speaker. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573-574 (1942). In *R. A. V.*, the state court tried to shoehorn the ordinance into the "fighting words" doctrine. See 505 U. S., at 413-414 (White, J., concurring in the judgment). That was a curious choice, and it compounded the difficulties of an already problematic ordinance. Although the targets of cross burning may be moved to violence, whether out of anger or an understandable belief in the need for a pre-emptive strike, that is not the usual result or the likely reason for the prohibition.

The second category, advocacy of violence, addresses the danger of the listener perpetrating an act of violence on a third person. That category is the subject of the exacting requirements of *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). It has no application to the present case. See *Black* v. *Commonwealth*, 262 Va. 764, 793-794, 553 S. E. 2d 738, 754-755 (2001) (Hassell, J., dissenting).

The third category is a threat of a violent act by the speaker against the listener. *Watts* v. *United States*, 394 U. S. 705 (1969) was a brief *per curiam* opinion that shed only a little light on this category. It held that the prohibition on threats against the President was constitutional, *id.*, at 707, but that a "true 'threat' " was required, at least under the statute in question. So what is a "true threat" and what is the other kind? The boundaries of this proscribable category are not well defined.

There can be little doubt that the conduct of Elliott and O'Mara lies well within the boundaries of proscribable conduct. Planting a burning cross in the target's yard is well understood to be a threat of violence, just as clearly as if they had spray-painted "We are going to lynch you" on the wall of Mr. Jubilee's home.

Black's case is more difficult. This was not a private burning, observed only by the Klan members. Cf. *Brandenburg*, 395 U. S., at 445-446. Instead, it was seen by others, with an intimidating effect, even though not directed at anyone in particular. See Pet. for Cert. 6-7. These facts are close enough to the constitutional line to make this case useful as a survey marker for mapping that line.

States can and should protect their citizens from threats of violence. Because threats inevitably involve expression, First Amendment challenges will be made. This area has not been well defined to date, and the present case is well suited to refine that definition. Legislatures need to know the boundaries so that they may draft and enact constitutional protections. In *Massachusetts* v. *Oakes*, 491 U. S. 576, 586 (1989), Justice Scalia indicated that the overbreadth doctrine is partly punitive, to provide legislatures with "incentive to stay within constitutional bounds in the first place." If the Court is going to do that, it has a responsibility to make clear where those bounds lie. Governing is not a shell game. Legislatures should not have to guess where the boundary is, and the law-abiding people of the state should not be punished when their representatives guess wrong. This is particularly true when the "expressive conduct" in question is terrorism. The peace, safety, and well-being of real people are at stake here.

III. The Virginia Supreme Court's overbreadth holding is contrary to *Brockett*.

The Virginia Supreme Court held that Virginia Code § 18.2-423 is invalid in its entirety under the federal First Amendment overbreadth doctrine because of its final paragraph. See *Black* v. *Commonwealth*, 262 Va. 764, 777, 553 S. E. 2d 738, 745-746 (2001), App to Pet. for Cert. 16-17. That paragraph reads: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

The Attorney General has explained why the state court's analysis is erroneous and worthy of review in one aspect. The court expanded the overbreadth doctrine beyond the actual prohibition of the statute to situations where a person might be erroneously charged. See Pet. for Cert. 27-29. This point is well presented and requires no further briefing at this stage.

There is another aspect of the state court's overbreadth analysis which also warrants this Court's review. Assuming for the sake of argument that there may be a problem with the final paragraph, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504-505 (1985) requires that severability be considered, with one possible caveat.

In cases coming from the lower federal courts, this Court has repeatedly held that the offending portion must be excised, rather than striking down the entire statute, unless that would be contrary to the legislative intent. See *id.*, at 505-506; *Reno* v. *ACLU*, 521 U. S. 844, 883 (1997). If this case had been decided in the federal courts, invalidation of the statute without considering severability would be clear error under *Brockett* and *Reno*.

This case, of course, does come from a state court. The *Brockett* rule is based on the principle that "a *federal* court should not extend its invalidation of a statute further than necessary to dispose of the case before it." 472 U. S., at 502 (emphasis added). The extent to which this principle is binding on state courts when they consider federal constitutional attacks on state statutes appears to be an open question, and it is an important one.

The state court in the present case unambiguously decided a federal question. It decided that the First Amendment forbids *any* enforcement of this statute because of the final paragraph, regardless of whether that paragraph is employed in the particular case and regardless of how powerful other evidence of intent to intimidate may be. The authority of state courts to judicially review state statutes on federal grounds derives from

the United States Constitution. See U. S. Const., Art. VI. The extent of that authority is a federal question, reviewable in this Court. The *Brockett* principle should apply equally to state courts when they consider federal constitutional challenges to state statutes.

Cases from state courts are different in some respects, of course. If the highest court of a state actually considers severability and decides the statute is not severable, that is a state-law question, see *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*), on which the state high court has the last word. That did not happen in this case, though, and a more obvious example of clean severability is difficult to imagine. The Virginia Legislature not only *would* have enacted the statute without the final paragraph, it actually *did*. See *Black*, 262 Va., at 771, and n. 4, 553 S. E. 2d, at 742, and n. 4, App. to Pet. for Cert. 6, and n. 4 (history of statute). If the last amendment really were unconstitutional, then it could easily be stricken, restoring the statute to its 1974 form.

The Virginia Supreme Court's decision to invalidate the entire statute constitutes a meat-axe misuse of the awesome power of judicial review. Because it was done in the name of the First Amendment, this error can and should be corrected by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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